Supreme Court U.S.

01 106 JUL 16 2001

OFFICE OF THE CLERK

In The

Supreme Court of the United States

LORENZO AVENDANO-RAMIREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES MARTIN DAVIS #10927
DAVIS & FINLEY
1623 Farnam Street, Suite 500
Omaha, Nebraska 68102
Phone: (402) 341-9900

Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

42 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the Constitution allow a trial court to force a defendant to represent himself, absent any request to proceed pro se, when the defendant has done nothing more than ask for a new lawyer to represent him?

2. Is the Sixth Amendment's right to counsel violated when a judge arbitrarily determines that the defendant has "implicitly" waived his right to counsel because of his demeanor when the defendant never at any time asserted his right to represent himself?

3. What is the current federal standard for determining whether a waiver of the right to counsel is "clearly and unequivocally" made and whether a defendant has affirmatively asserted his right to proceed pro se?

4. Does a defendant receive a fair trial when he is required to represent himself pro se, he is then excluded from the courtroom and the standby counsel whom he has previously fired presents no defense on his behalf?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdictional Statement 1

Relevant Constitutional Provisions and Statutes 2

Statement of the Case 2

Reasons for Granting the Writ 8

I. The Eighth Circuit's decision is in direct conflict with the decisions of other circuits and state courts of last resort 8

II. There is currently no "bright line" rule for determining whether a waiver of the Sixth Amendment right to counsel must be waived unequivocally or if it can be implied from ambiguous circumstances and forced upon a defendant 13

III. The Eighth Circuit was Constitutionally deficient in failing to conduct an examination as to whether there was a clear and unequivocal request on the record to forego counsel 25

IV. As a matter of public policy and constitutional law, a waiver of the right to counsel should only be valid when the defendant makes an unequivocal and intentional assertion of his right to self-representation 26

Conclusion 29

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Adams v. Carroll, 875 F.2d 1441 (9th Cir. 1989)....27, 28

Berry v. Lockhart, 873 F.2d 1168 (8th Cir. 1989)..... 16, 17, 19, 26

Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).....25, 27

Burton v. Collins, 937 F.2d 131 (5th Cir. 1991), cert. denied, 502 U.S. 1006 (1991).....16, 27

Carnley v. Cochran, 369 U.S. 508, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962)..... 26

Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)..... *passim*

Fields v. Murray, 49 F.3d 1024 (4th Cir. 1995), cert. denied, 516 U.S. 884 (1995).....15, 16, 27

Fitzpatrick v. Wainwright, 800 F.2d 1057 (11th Cir. 1986).....14, 16

Jackson v. Ylst, 921 F.2d 882 (9th Cir. 1990)..... 10

Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938).....24, 27

Marshall v. Dugger, 925 F.2d 374 (11th Cir. 1991)...9, 10

Moreno v. Estelle, 717 F.2d 171 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984)..... 9

Perry v. United States, 364 A.2d 617 (D.C. 1976) 8

State v. Garcia, 600 P.2d 1010 (Wash. 1979).... 11, 12, 13

United States v. Arlen, 252 F.2d 491 (2nd Cir. 1958).....20, 21

United States v. Auen, 864 F.2d 4 (2nd Cir. 1988)..... 21

TABLE OF AUTHORITIES – Continued

Page

United States v. Fazzini, 871 F.2d 635 (7th Cir. 1989) 21, 22

United States v. Moore, 706 F.2d 538 (5th Cir. 1983), cert. denied, 464 U.S. 859 (1983) 21

United States v. Stewart, 20 F.3d 911 (8th Cir. 1994) 25

United States v. Weisz, 718 F.2d 413 (D.C. Cir. 1983), cert. denied, 465 U.S. 1027, 465 U.S. 1034 (1984) 11

United States v. Willie, 941 F.2d 1384 (10th Cir. 1991), cert. denied, 502 U.S. 1106 (1991) 20

UNITED STATES CONSTITUTION:

Amendment VI 2, 8, 11, 13, 16, 22

STATUTES:

28 U.S.C. § 1254(1) 2

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Lorenzo Avendano-Ramirez, respectfully prays that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on December 19, 2000.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit has not been reported. It is reprinted in the Appendix hereto, p. 1, *infra*.

The Judgment Order of the Court of Appeals for the Eighth Circuit has not been reported. It is reprinted in the Appendix hereto, p. 4, *infra*.

The Order of the United States District Court for the District of Nebraska denying the Petitioner's Motion to Recuse has been reprinted in the Appendix hereto, p. 5, *infra*.

The Order of the United States District Court for the District of Nebraska denying the Petitioner's Motion for a New Trial has been reprinted in the Appendix hereto, p. 6, *infra*.

The Order of the Court of Appeals for the Eighth Circuit denying the Petitioner's Petition for Rehearing and for Rehearing En Banc has been reprinted in the Appendix hereto, p. 7, *infra*.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 19, 2000, affirming Petitioner's conviction dated May 8, 2000. The

Court of Appeals for the Eighth Circuit denied a timely Petition for Rehearing on February 15, 2001.

On May 2, 2001, Justice Thomas ordered that the time for filing this Petition for Writ of Certiorari be extended to and including July 15, 2001.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

I. Synopsis

The Petitioner in this case was a twenty-two (22) year old Mexican national who could neither read, write, nor speak the English language. He had only a 6th grade education in Mexico and knew nothing about American criminal law or procedure except that he had a right to a lawyer of his own choosing who would represent him effectively.

Prior to this trial he became convinced that his lawyer had done nothing on his behalf and was not prepared to effectively represent him. He had frequent arguments

with his lawyer who wanted him to plead guilty. At least eight days before trial he fired him, telling the lawyer he wanted him to withdraw.

Contrary to the client's wishes, the lawyer never moved to withdraw. Instead, he waited until the day of trial to do so, and then he did so orally. At that time the defendant repeatedly told the court that he did not want to proceed to trial with this lawyer but instead wanted to hire another attorney.

The court, however, instead of continuing the trial to allow the defendant to obtain new counsel, required this young, uneducated, and legally naïve defendant to defend himself. Prior to this time, the defendant never at any time asked to proceed pro se. He specifically told the court he did not wish to represent himself and that all he wanted was another lawyer.

Nowhere in the record did the defendant ever knowingly, intelligently, or voluntarily waive his Sixth Amendment right to the effective assistance of counsel. Nowhere in the record did the defendant ever assert or affirmatively request the court to be allowed to proceed pro se. All he ever did throughout the record was to insist on his right to have another lawyer represent him.

Nonetheless, without any clear and unequivocal waiver – either explicit or implicit – he was forced by the court to proceed pro se. The court appointed the lawyer with whom he was so unhappy to serve as standby counsel.

Shortly after the trial began, the trial judge excluded the defendant from the very trial in which he was supposed to be representing himself. The defendant was brought in only for short moments during the trial for the purpose of witness identification.

During the trial, standby counsel put on no defense by way of witnesses or evidence, and the defendant was convicted in effect "in absentia" and without a lawyer. As a result of this conviction he was sentenced to 10 years and one month imprisonment.

II. Statement of the Facts

On the opening day of his jury trial on May 4, 2000, the defendant at his first opportunity immediately stated his dissatisfaction with his attorney and requested alternative counsel. (I: 2). After several requests for another attorney, the trial judge refused to delay the trial or appoint alternative counsel. The defendant at no time ever asked to represent himself. He wanted nothing more than to be represented by a different lawyer. It was the trial judge that first introduced the notion of proceeding pro se to the Petitioner.

THE COURT: Well, I'm telling you you're not going to have another attorney. And if you don't want this one, why, you can try the case yourself. You can try the case pro se. I advise against that because there's many, many complicated things involved here and you need an attorney. And you best use the one you've got.

(I: 6).

Shortly thereafter, the Petitioner's trial attorney moved to withdraw, stating that the Petitioner had advised him several times prior to trial that he wanted this attorney to withdraw from his case. (I: 8). The trial attorney failed to file a motion to withdraw prior to the trial despite these expressed wishes of the Petitioner. In response to the attorney's oral motion to withdraw, the trial judge asked the Petitioner directly whether he wanted to proceed pro se, to which the Petitioner responded: "I want another attorney. I

said that I wanted another attorney." (I: 8). The judge, ignoring the wishes of the defendant, then proceeded to ask the Petitioner through an interpreter a series of questions regarding his understanding of his Constitutional right to self-representation. He also asked him about his understanding of the charges against him, his understanding of law in general, his understanding of the rules of evidence, and whether he understood a waiver of the right to counsel has to be "knowing and voluntary." (I: 9-14). The Petitioner, a Mexican national, answered each of these questions through the interpreter by either making it clear that he had no understanding of the law or the judicial system, or by reaffirming his request for alternative counsel based on his dissatisfaction with his trial attorney. Here again the defendant never asked to represent himself.

After the judge established on the record that the Petitioner had no understanding of the law and that he was completely unprepared to proceed pro se, the trial attorney again moved to withdraw. (I: 19). The court in effect then forced a waiver of the right to counsel upon the Petitioner in the following exchange:

THE COURT: Do you want to represent yourself in this trial or do you want Mr. Wilson to represent you?

THE DEFENDANT: I don't want him as a lawyer as I told you already.

THE COURT: Then we'll allow you to represent yourself. And I'm appointing you, Mr. Wilson [appointed counsel], as standby counsel.

MR. LOPEZ-WILSON: That's fine, your Honor.

THE DEFENDANT: I don't want to hear anything. And I've said it many times that I want a different lawyer.

THE COURT: All right. I want to – I'm going to warn you, Mr. Avendano, I'm going to allow you to represent yourself now since you don't want Mr. Wilson to represent you.

THE DEFENDANT: I want a different lawyer. I don't want to hear about anything now. I don't want to hear anything, I just want a different lawyer that will do something for me.

(I: 19-20).

The Petitioner never at any time asked or implied during these exchanges that he wanted to represent himself in his trial. In fact, at one point, the Petitioner requested a specific attorney by name. (I: 58). The Petitioner's standby attorney admitted he knew that the other attorney had been contacted by the Petitioner prior to trial. (I: 59). Despite this clear evidence that all the Petitioner was really seeking was alternative counsel, the court "allowed" the Petitioner to proceed without counsel based on its annoyance with his repeated requests for a different attorney. While the defendant had a right to counsel, it was the judge in his case who waived this right for him.

After being appointed as standby counsel, the trial attorney expressed his concern to the court about the "animosity" between the attorney and the Petitioner. (I: 20).

The court then made the following finding regarding the court-imposed waiver of the right to counsel by the Petitioner:

THE COURT: I find that due to the defendant's actions, he has knowingly and voluntarily waived his

right to the services of Mr. Joe Lopez-Wilson, his court-appointed attorney.
(I: 23).

The Petitioner continued to request another attorney even after the court imposed this waiver on him. Mere minutes after forcing the Petitioner to proceed pro se, the trial judge ordered the Petitioner removed from the courtroom. (I: 25). Throughout the duration of the trial, the Petitioner was only brought into the courtroom for identification purposes and removed afterwards each time. (II: 125, 150, 187, 188, 220, 224). In a conversation between the trial judge and the Petitioner, the Petitioner stated he did not want to be present in the courtroom until he had a new attorney. (I: 75). So the defendant was excluded from the very trial in which he was told by the court he would have to represent himself.

The standby counsel presented no evidence on the Petitioner's behalf. (II: 322). At one point in the proceedings, after conferring with the Petitioner, the appointed attorney stated to the court the following:

MR. LOPEZ-WILSON: I've discussed the issues with my client. He does not want to be present during the rest of the proceedings. He does not want me to have his input in terms of cross-examination. And if the court wants, I will do what I think is appropriate cross-examination or I could just waive it. My client has indicated to me that he doesn't want me to do anything. So if the Court accepts it, I'll be all right with that as well.
(II: 187).

The Petitioner was convicted on four counts of Delivery of Methamphetamine and one count of Criminal Forfeiture on May 8, 2000 and later sentenced to 10 years and one month imprisonment. The Petitioner's Motion for a

New Trial was denied on July 7, 2000. (App. 6, *infra*). Likewise, the Petitioner's Motion to Recuse was denied on June 23, 2000. (App. 5, *infra*). The Eighth Circuit Court of Appeals affirmed the judgment of the District Court on December 19, 2000, upholding the court-imposed waiver of counsel as being valid. (App. 1, *infra*). The Petitioner requested a rehearing en banc, which was denied on February 15, 2001.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's decision is in direct conflict with the decisions of other circuits and state courts of last resort.

In this case, the Eighth Circuit has upheld a "court-imposed waiver" of the Petitioner's Sixth Amendment right to counsel in the absence of any request by the defendant for self-representation. The record shows clearly that all the Petitioner had requested was another attorney. He repeatedly told the court that he did "not want this attorney" and that he wanted "another attorney." The Eighth Circuit failed to cite *any* portion of the record that could be construed to demonstrate even an arguable request for self-representation. The courts have universally followed the principle that statements of a desire to forego representation by a particular attorney do not indicate an intent for self-representation. *Perry v. United States*, 364 A.2d 617 (D.C. 1976). In this case, by treating the defendant's statements of dissatisfaction with his attorney and his request for another the same as an unarticulated request to proceed pro se, the Eighth Circuit is in direct conflict with the holdings of several other circuits.

Fifth Circuit

In *Moreno v. Estelle*, 717 F.2d 171 (5th Cir. 1983), *cert. denied*, 466 U.S. 975 (1984), the Fifth Circuit held that a defendant's request on the opening day of trial for substitute counsel, based on dissatisfaction with his attorney's work, does not amount to the invocation of the defendant's right to represent himself. The Court held it could not infer from the defendant's mere request to dismiss his attorney that he desired to waive counsel and continue the trial pro se. *Id.* at 175. The Fifth Circuit also stated: "While the right to counsel is in force until *waived*, the right of self-representation does not attach until *asserted*." *Id.* at 174 (emphasis added). Because the defendant in *Estelle* did not explicitly state he wished to proceed pro se, instead only expressing the problems he was having with his attorney, the Court held that there was no valid, unequivocal waiver of counsel.

Eleventh Circuit

Similarly, in *Marshall v. Dugger*, 925 F.2d 374 (11th Cir. 1991), the defendant requested that the court discharge his attorney on the opening day of trial. The trial court refused to dismiss the attorney, appoint substitute counsel, or postpone the trial. Instead, the court offered the defendant three options: continue with his appointed counsel, proceed pro se, or represent himself with his appointed counsel acting as standby counsel. *Id.* at 376. In response, the defendant repeated his opinion that his attorney was unqualified. This was the same response to every question asked of him by the court. The trial court then forced the defendant to represent himself, even

though he did not affirmatively choose self-representation as his option. *Id.* at 377. The Eleventh Circuit held here that the trial court erred in forcing the defendant to proceed pro se in the absence of a unequivocal waiver of his right to counsel, and the decision of the trial court was reversed. The court did not equate dissatisfaction with appointed counsel with a desire for self-representation.

Ninth Circuit

In *Jackson v. Ylst*, 921 F.2d 882 (9th Cir. 1990), the Ninth Circuit upheld the district court's denial of a defendant's request for self-representation because the Circuit found the request to be equivocal and merely a reactionary response to the trial court's denial of his earlier request for substitute counsel. In *Ylst*, at the hearing on his motion for substitute counsel, the defendant stated the following immediately after the denial of his motion: "Hey, *I don't see why* [the motion for substitute counsel] *isn't granted*. I'm doing the filing of the motion [for a new trial]. What good is [appointed trial counsel] doing for me now? I want to fight in pro per *then*. Relieve him and I do this myself." *Id.* At 889 (emphasis added). These comments were determined to be indicative only of his desire to be represented by a different attorney, not a sincere desire to represent himself. The Ninth Circuit held that because the defendant's request to represent himself was nothing more than an emotional response to the denial of his motion for substitute counsel, and did not represent an unequivocal assertion of his right to waive his right to counsel, the denial of the defendant's request was upheld.

D.C. Circuit

In *United States v. Weisz*, 718 F.2d 413 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1027, 465 U.S. 1034 (1984), the D.C. Circuit made a clear distinction between requests for self-representation and requests for alternative counsel for the purposes of the Sixth Amendment. The defendant in *Weisz* chose to represent himself pro se during his first trial. Prior to the beginning of his second trial, the defendant filed a motion requesting that the court: "enter its Order allowing the defendant to represent himself with assigned counsel, or in the alternative, Stand-by Counsel other than [assigned counsel]." *Id.* at 424. The Court held that this motion was to be interpreted as a request for alternative counsel, not an unequivocal assertion of his right to waive his Sixth Amendment right to counsel, as the defendant claimed on appeal. The Court followed the more logical reasoning that requests for alternative counsel, even if untimely, do not equate to a defendant's desire to proceed pro se.

State Courts

The decision of the Eighth Circuit in this instant case also conflicts directly with the decisions of several state courts of last resort that have ruled on these same Sixth Amendment waiver issues. Most notably, in *State v. Garcia*, 600 P.2d 1010 (Wash. 1979), the Supreme Court of Washington dealt with a fact pattern almost on all fours to that of the Petitioner's. In *Garcia*, the defendant repeatedly stated to the court on the morning of trial that he did not want his appointed attorney and that he wanted another attorney. Just as in the Petitioner's case, the defendant and the defendant's attorney gave differing

accounts of their attorney-client relationship. The court accepted the attorney's account and decided not to delay trial, or appoint another attorney, and the trial continued as scheduled. On appeal, the defendant claimed that his Sixth Amendment rights were violated because the court failed to adequately inquire as to whether the defendant wanted to represent himself pro se. The Court held that the U.S. Supreme Court's decision in *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), "does not impose an affirmative duty upon the trial judge to advise a defendant of his right to represent himself unless the defendant first indicates that he desires to proceed pro se." *Garcia* at 1014. The Washington Supreme Court found that the defendant never made such a request, ruling further that: "Statements of desire not to be represented by a court-appointed attorney do not express an intent to represent oneself without counsel." *Id.* at 1015. Because the defendant's statements of dissatisfaction for his attorney did not constitute the necessary unequivocal request for self-representation, the Court found that the trial court committed no error by not inquiring whether the defendant wanted to proceed pro se. *Id.* at 1015. The reasoning in the decision in *Garcia* should be mirrored in the Petitioner's case. As stated before, the record clearly shows that the defendant never made any sort of request, direct or indirect, to represent himself at his trial. To the contrary, the Petitioner did, however, make numerous statements that he "did not want this attorney" in response to the trial court's inquiries. By upholding the district court's decision, the Eighth Circuit has improperly treated the defendant's desire not to be represented by his trial attorney into a subliminal request for self-

representation. This is in direct conflict with the holding in *Garcia* and the other cases examined herein.

These cases all hold that there is a clear distinction between requests for alternative counsel as opposed to requests to proceed pro se. They are two separate and distinct animals. Each court has refused to infer that a defendant was somehow asserting his right to waive his counsel and proceed pro se by expressing nothing more than a dissatisfaction with his current representation.

II. There is currently no "bright line" rule for determining whether a waiver of the Sixth Amendment right to counsel must be waived unequivocally or if it can be implied from ambiguous circumstances and forced upon a defendant.

In *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), this Court granted defendants the right to forego their right to counsel under the Sixth Amendment and conduct their own defenses. In order for the waiver to be valid this Court held that the decision must be made "knowingly and intelligently" and the request must be "clear and unequivocal." *Id.* at 835. The majority of courts both federal and state have followed *Faretta* in requiring this "clear and unequivocal" waiver. However, a disturbing number of recent decisions have eroded the "unequivocal" waiver test into a much lower standard whereby that this Sixth Amendment right can be "implicitly" waived. The right to counsel is one of the most precious and fundamental rights a criminal defendant possesses. Therefore, the ability of a court to "imply a waiver" and force a defendant to unwillingly represent himself conflicts directly with the lofty purpose of the Sixth Amendment. The state and federal courts clearly need a bright line rule from this Court spelling out what

actually constitutes a "clear and unequivocal" waiver of the right to counsel.

The decisions of circuit courts that strictly construe the standard for what constitutes a "clear and unequivocal" waiver of the right to counsel have established a basic framework.

Eleventh Circuit

A clear-cut decision where a defendant's intention to proceed pro se and to waive his right to counsel was held valid in *Fitzpatrick v. Wainwright*, 800 F.2d 1057 (11th Cir. 1986). In *Fitzpatrick*, the Court held that the defendant made his choice for self-representation with his "eyes open" when he stated to the judge that he did not want a public defender, he signed a written waiver expressly waiving his right to be represented by counsel, and he stated immediately prior to trial that he did not need counsel. *Id.* at 1064. Given these facts, there was no question that the defendant's behavior could be construed as a "clear and unequivocal" waiver. There, the defendant made *explicit* statements to the court regarding his intention to proceed pro se.

In the Petitioner's case, the court-imposed waiver was upheld solely on the basis of his repeated requests to discharge his attorney and obtain a new one, without any explicit statements showing an intention to waive his Constitutional right to counsel. The holding in *Fitzpatrick* is in concert with this Court's intended definition of a "clear and unequivocal" waiver; where the defendant makes multiple assertions of his right of waiver and there is no question that the relinquishment of the defendant's Constitutional rights is intentional.

Fourth Circuit

In *Fields v. Murray*, 49 F.3d 1024 (4th Cir. 1995), *cert. denied*, 516 U.S. 884 (1995), a defendant's habeas corpus petition was denied because he had not clearly and unequivocally invoked his right to self-representation. The defendant in *Fields* mentioned the possibility of proceeding to trial pro se only in a letter addressed to the trial judge, the third such letter, which asked for the possibility of cross-examining one particular witness himself, as opposed to his attorney. The letter stated in part: "I have no choice left but to dismiss [appointed counsel] as my council (sic) and act as my own council (sic) at the trial." *Id.* at 1033. This letter to the judge was the only indication that the defendant wanted to proceed pro se, and that was only for the limited purpose of cross-examining one witness. Furthermore, when the court questioned the defendant at a hearing to address the defendant's letters, the defendant made no statements indicating a desire to waive his Sixth Amendment rights. *Id.* at 1033. Based on these facts, the Court held that the defendant did not clearly and unequivocally assert his right to waive counsel, despite what the defendant claimed on appeal. The fact that the defendant in *Fields* at least made *one* statement indicating a partial interest in proceeding pro se distinguishes this case from that of the Petitioner.

The defendant in *Fields* clearly had an interest in presenting part of his case himself, whereas at no time during the Petitioner's trial did the Petitioner suggest he would be better off in handling *any* part of his case on his own. If a partial interest in proceeding pro se is not enough to constitute a clear and unequivocal waiver, how

in this case can a court-imposed waiver in the absence of any expressed desire to proceed pro se be valid?

Fifth Circuit

The Fifth Circuit Court of Appeals held in *Burton v. Collins*, 937 F.2d 131 (5th Cir. 1991), *cert. denied*, 502 U.S. 1006 (1991), that a defendant's single inquiry to a judge of "may I represent myself" was not enough to represent a clear and unequivocal request for a waiver. The defendant in *Burton* did not repeat his request, and the question to the judge came after the defendant expressed dissatisfaction with his appointed attorney and his request for alternative counsel was denied. *Id.* at 134.

Again, the Petitioner's case can be distinguished from *Burton* because the defendant in *Burton* at least asked a question indicating he was contemplating the option of self-representation. Without a clear indication on the record that the defendant intended to waive his right to counsel, the *Burton* court held the record as a whole did not reflect any Sixth Amendment violation.

Using *Fitzpatrick*, *Fields*, and *Burton* as a guideline for courts that have strictly construed the "clear and unequivocal" standard, it is clear that a defendant must make an explicit, unambiguous request to the court in order for a waiver to be real. When a defendant does not agree to proceed on his own behalf, as in the Petitioner's case, the waiver can in no way be held to be "clear and unequivocal" when it is arbitrarily forced upon him.

Eighth Circuit

In the past, the Eighth Circuit in *Berry v. Lockhart*, 873 F.2d 1168 (8th Cir. 1989), strictly construed this standard.

In *Berry*, the Eighth Circuit held that a court-imposed Sixth Amendment waiver was invalid based in part on the fact the trial court forced the defendant to represent himself pro se, even though he never asked nor agreed to do so as he continued to ask steadfastly for counsel. *Id.* at 1171. The facts in the earlier Eighth Circuit case closely match those of the Petitioner's. In *Berry*, on the opening day of trial, both the defendant and his attorney brought their conflicts with each other to the court's attention. The trial court refused to delay trial or appoint alternative counsel, instead forcing the defendant to proceed pro se. In holding this wavier to be invalid, the Eighth Circuit focused on the fact the record showed that the defendant repeatedly asked for another lawyer and indicated to the court that he was not prepared or capable of representing himself. Furthermore, the Eighth Circuit found error because the defendant's requests for alternative counsel were ignored even though the defendant's dispute with his attorney was clearly not just the defendant's fault, since the defendant was alleging his attorney had not communicated with him while incarcerated and also was unprepared. *Id.* at 1171.

Now in the instant case the Eighth Circuit has reversed itself. The record in the Petitioner's case establishes that his complaints of his attorney were the same as that in *Berry*. (I: 9-10). Also, the record in the instant case establishes that the Petitioner indicated he was clearly unprepared, unwilling, and incapable of representing himself at trial. (I: 17-18).

The following exchange between the trial judge and the Petitioner, while the judge was attempting to demonstrate a knowing and intelligent waiver, is typical of the court proceedings in the instant case:

THE COURT: Have you ever studied law, Mr. Avendano?

THE DEFENDANT: If I studied?

THE COURT: The question was have you ever studied law?

THE DEFENDANT: Law? I don't understand.

THE COURT: Do you know what the law is, sir?

THE DEFENDANT: No, I don't know, and that's why I want another attorney because I don't know. I need another attorney to represent me.

[I: 10]

Subsequently, the court, on its own, raises the subject again:

THE COURT: I think it's unwise of you to try to represent yourself.

THE DEFENDANT: *I don't want* that – like I said, I don't want him as a lawyer. (emphasis added).

[I: 15]

Despite the fact that the defendant stated on the record that he did not wish to represent himself, the judge continued with the colloquy.

THE COURT: You are not familiar with the law.

THE DEFENDANT: Right. Exactly, that's why I want to get a lawyer to represent me well.

THE COURT: You are not familiar with court procedures.

THE DEFENDANT: No, I don't know anything about that. I've never been in this before.

THE COURT: You're not familiar with the rules of evidence.

THE DEFENDANT: Well, it's like I said, I just don't want this lawyer.

[I: 15]

Finally, and perhaps most revealing on the defendant's unwillingness to proceed pro se:

THE COURT: I take it from your response to the Court that you wish to represent yourself instead of having Mr. Wilson represent you; is that correct?

THE DEFENDANT: *No, I don't want to be my own lawyer.* I just want to get a lawyer that's going to represent me correctly. (emphasis added).

[I: 18]

Here in the record is an unequivocal statement that the defendant did not want to proceed pro se.

These portions of the record expressly and dramatically show the Petitioner had no intention or desire to waive his right to counsel and proceed pro se. Yet, despite the numerous similarities between the Petitioner's case and *Berry*, the Eighth Circuit decided in his case to overrule its old standard for a "voluntary" waiver by upholding an equivocal waiver under circumstances where it would have previously struck it down. Based on its holding in *Berry*, the Eighth Circuit had until this case adhered to the requirement of a waiver being "clear and unequivocal." With the Petitioner's case, they have now abandoned that requirement and made it possible for a trial judge to waive a defendant's right to counsel for him under the most suspicious circumstances.

Although the majority of courts examine each waiver of counsel case looking for a "clear and unequivocal" Sixth Amendment waiver, a number of cases have carelessly allowed courts to infer mystically that defendants

have waived his right to the assistance of counsel, regardless of whether the defendants had any prior inclination to represent themselves.

Legally and logically, the only circumstances that could constitute an inferred waiver would be when the defendant's conduct makes it absolutely certain to the court that the defendant desires, understands, and is explicitly exercising his right to self-representation.

Tenth Circuit

One such case was present in *United States v. Willie*, 941 F.2d 1384 (10th Cir. 1991), *cert. denied*, 502 U.S. 1106 (1991), where the Court held it was appropriate for the trial court to infer the defendant waived their right to counsel when he made several assertions of his right to self-representation, he repeatedly refused to accept the assistance of admittedly competent and available counsel, and, perhaps most importantly, he filed numerous pro se petitions. The defendant's actions in *Willie* were unambiguous and the relinquishment of his right to counsel can easily be deemed intentional by the fact he took it upon himself to file several pro se petitions as opposed to searching for an alternative attorney. This never happened in the instant case.

Too often courts without guidance from the U.S. Supreme Court have diluted the standard for a "clear and unequivocal" waiver so that waivers can somehow be implied from facts that fall far short of the circumstances in *Willie*.

Second Circuit

In *United States v. Arlen*, 252 F.2d 491 (2nd Cir. 1958), it was held that the defendant implicitly waived his right

to counsel when the defendant had not timely retained counsel before trial, and where the defendant showed no reason for his failure to retain an attorney in time. There was no express waiver by the defendant in *Arlen*. The Second Circuit also upheld an implied waiver in the absence of an express request in *United States v. Auen*, 864 F.2d 4 (2nd Cir. 1988), where the defendant refused counsel as part of the strategy of a protest group of which he was a member, rejecting the trial judge's repeated offers for the opportunity to obtain counsel.

Fifth Circuit

Some other courts now have followed the dangerous reasoning used in *Arlen* to empower courts on their own to impose a waiver on a defendant's right to the assistance of counsel whenever the court determines the defendant is being "stubborn" in his attempt to hire another attorney. A few cases have simply implied waivers where the defendant has rejected several court-appointed attorneys. In *United States v. Moore*, 706 F.2d 538 (5th Cir. 1983), *cert. denied*, 464 U.S. 859 (1983), the Fifth Circuit held that persistent demands for the dismissal of counsel, if deemed unreasonable by the court, are functionally equivalent to a knowing and voluntary waiver of counsel. Again, as in *Arlen*, there was no explicit waiver by the defendant in *Moore*.

Seventh Circuit

Similarly, in *United States v. Fazzini*, 871 F.2d 635 (7th Cir. 1989), the Seventh Circuit held that a defendant's refusal to cooperate with four successive court-appointed attorneys who were either dismissed by him or by the

court constituted an implied waiver of the right to counsel. In *Fazzini*, the court held that a defendant's "actions which have the effect of depriving himself of appointed counsel will establish a knowing and intentional choice." *Id.* at 642. These holdings deviate from the intentions of the U.S. Supreme Court in *Faretta v. California* (*supra*) by hinging the waiver of counsel on the court's interpretation of the defendant's behavior, by allowing them to impose a waiver based on nothing more than their annoyance with defendants who are being "stubborn."

This Court in *Faretta* clearly intended exercise of this important right to be an explicit, intentional choice made by an individual defendant. Cases such as those above as well as the Petitioner's case, where a defendant gives no indication that he is inclined to proceed pro se, improperly transfer the power to waive the right to counsel to the courts, which prejudices the defendant in every stage of the proceedings thereafter. Since the Sixth Amendment gives only the defendants the right to counsel at every critical stage of a criminal proceeding; the power to waive this right should be vested with the defendant alone and not subject to inferences that are artificially drawn by a court.

The Petitioner's case falls far short of the conduct of defendants in these other cases of court-imposed waivers. The Petitioner's request for alternative counsel on the opening day of trial was not done to delay the proceedings or otherwise. As the record shows, it was the Petitioner's trial attorney who first alerted the court that the defendant had expressed dissatisfaction with his representation prior to trial and that the defendant had asked him to withdraw:

MR. LOPEZ-WILSON [appointed counsel]: Your Honor, maybe just to make everything clear, I probably should enter a motion orally to withdraw from the case. I've asked my client on several occasions if that's his wish, and he says yes, and it doesn't matter if he goes alone. Just to be safe for the Court's purposes, I probably should ask the Court to allow me to withdraw and let him proceed pro se. I think that's what he –

THE COURT: Is that what you want to do, Mr. Avendano?

THE DEFENDANT: I want another attorney. I said that I wanted another attorney.

[I: 8].

Here again, the defendant expressed no desire to proceed pro se, even in direct response to the court's questions. This is not a case where the Petitioner annoyed the court by rejecting several attorneys or where he was making unreasonable requests for alternative counsel. His trial attorney was his only attorney up until that point in the proceedings. There was clearly a conflict between the Petitioner and his trial attorney, as both sides expressed frustration with the other. The Petitioner also told the trial court that he had asked his attorney to withdraw:

THE DEFENDANT: I told this attorney about eight days ago that I did not want – I didn't want him as an attorney. And only four or five days ago he started doing something for me because he hasn't done anything for me. He only started working about four or five days ago.

[I: 10].

In this case the Eighth Circuit unconstitutionally lowered the standard for a "clear and unequivocal" waiver even lower than any other circuit by contriving an

implicit waiver under these circumstances. The Petitioner filed no pro se petitions, he never asked the court for the right to represent himself, and he never asserted his right to self-representation in any manner, shape, or form. The trial court conveniently contrived an implied waiver here on the sole basis of its annoyance with the Petitioner's repeated requests for his trial attorney to be discharged and for alternative counsel.

The cases outlined above demonstrate a major deterioration in the standard set forth in *Faretta*. The "clear and unequivocal" standard has been diluted by some courts to the point where courts can now sua sponte impose a waiver when they sense that the defendant may have somehow implicitly waived his right to counsel. As this Court stated in *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938), "a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Allowing a court to conveniently create a waiver when the defendant has made no assertions of self-representation contradicts the very idea of a "knowing and intelligent" and "clear and unequivocal" waiver of a Constitutional right.

A bright line rule from this Court is essential in order to prevent the further weakening of its standard set in *Faretta*. The Petitioner's court-created waiver clearly would not stand if the "clear and unequivocal" standard was strictly construed. Even based on the fact patterns of those cases where implied waivers have been upheld, the Petitioner's case does not rise to the level of an implied waiver. A bright line rule from this Court could once and for all put the power of a knowing, intelligent, clear and unequivocal waiver back in the defendant's hand where

the Constitution and the U.S. Supreme Court say that it belongs.

III. The Eighth Circuit Court of Appeals was Constitutionally deficient in failing to conduct an examination as to whether there was a clear and unequivocal request on the record to forego counsel.

In the Eighth Circuit opinion affirming the district court, the panel performed an inadequate and incomplete analysis of the record in determining whether the Petitioner's court-imposed waiver was Constitutionally valid. The Court dismissed the Petitioner's argument in two short sentences, stating:

> "Avendano-Ramirez now contends his waiver of his right to counsel was not knowing, voluntary, and intelligent. Having reviewed the particular facts and circumstances surrounding the case, we conclude the district court made Avendano-Ramirez aware of his right to counsel or to represent himself, and of the possible consequences if he decided to proceed without counsel's help."

(App. 2, *infra*)

While part of the necessary analysis as established by *Faretta* is to determine whether the waiver is knowing and intelligent by way of an inquiry between the judge and defendant, the analysis does not end there. *United States v. Stewart*, 20 F.3d 911 (8th Cir. 1994). As this Court stated in *Brewer v. Williams*: "But waiver requires not merely comprehension but relinquishment . . . " 430 U.S. 387, 404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977). The Court was still required to determine if there was a "clear

and unequivocal" assertion of the right, or in the alternative language favored by the Eighth Circuit, whether the waiver was "voluntary." *Berry v. Lockhart, supra.*

The Eighth Circuit opinion in this case completely ignored the issue that Avendano's waiver was not explicit and was instead imposed by the court on an unwilling defendant. As evidenced by the case law, the instant facts leading to the court's forced waiver do not rise to the level any of those cases where implied waivers have been upheld. The Eighth Circuit was unable to pinpoint any portion of the record that would lead a reasonable person to conclude that the Petitioner intended, or even considered, representing himself in his trial. There is absolutely no possible way of construing the record in this case to support the notion that the court's forced waiver of counsel was a voluntary waiver. By failing to address the issue of whether the Petitioner's waiver was either "voluntary" or done "clearly and unequivocally," the Eighth Circuit both avoided and ignored a crucial element of the standard for waiving a fundamental Constitutional right. Where the record shows nothing in the nature of an affirmative waiver, no presumption that a waiver occurred will be indulged. *Carnley v. Cochran*, 369 U.S. 508, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962).

IV. As a matter of public policy and constitutional law, a waiver of the right to counsel should only be valid when the defendant makes an unequivocal and intentional assertion of his right to self-representation.

This Court has held that lower courts are to indulge every reasonable presumption against the waiver of fundamental Constitutional rights and that acquiescence is

never presumed in the loss of such fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938). This idea was echoed in this Court's ruling in *Faretta v. California, supra*, by requiring a waiver of the right to counsel to be asserted "clearly and unequivocally." *Id.* at 835. In examining the question of waiver as a matter of federal Constitutional law this Court has always stated that it is incumbent upon the State to prove that an alleged waiver was an "intentional relinquishment or abandonment of a known right or privilege," and that this strict standard applies equally to all stages of a criminal proceeding, including the trial itself. *Brewer v. Williams* at 404, 1242. The dilution of the standard set forth in *Faretta* for waiving the right to counsel by allowing a court to imply waiver without any explicit assertion flies in the face of the "test" for waiving fundamental rights as designed by this Court. It also allows trial courts to manufacture a waiver when no genuine waiver exists.

In *Adams v. Carroll*, 875 F.2d 1441 (9th Cir. 1989), the Ninth Circuit Court of Appeals stated that the "clear and unequivocal" requirement serves two purposes. "First, it acts as a backstop for the defendant's right to counsel, by ensuring that the defendant does not inadvertently waive that right through occasional musings on the benefits of self-representation." *Id.* at 1444. Several cases examined earlier illustrated this necessary justification for a strict construction of the standard. The courts in *Fields* and *Burton* (*supra*) refused to find an assertion of a waiver of the right to counsel where the defendant only made a single remark about proceeding pro se or asked the judge a question about the right of self-representation. "Because a defendant normally gives up more than he gains when

he elects self-representation, we must reasonably be certain that he in fact wishes to represent himself." *Id.* at 1444. While this purpose hopes to protect the defendant from the likely prejudice that he will cause himself in self-representation, the second purpose proposed by the Ninth Circuit in *Adams* focuses on protecting the integrity of the court system. "The requirement that a request for self-representation be unequivocal also serves an institutional purpose: It prevents a defendant from taking advantage of the mutual exclusivity of the rights to counsel and self-representation." *Id.* at 1444.

Many of the cases examined herein dealt with defendants with ambiguous conduct concerning their waiver of counsel at trial who later claimed on appeal that their Sixth Amendment rights were violated: if the court permits or requires self-representation, the defendant can claim on appeal that his right to counsel was violated; but if the court appoints counsel the defendant can then claim that his right to self-representation was violated.

In the Petitioner's case, if this Court sets a bright line rule requiring a strict construction of the "clear and unequivocal" assertion so that each defendant must make an explicit choice, these meritless appeal issues will never arise.

Under the logic of the Eighth Circuit in this case, a court may determine by fiat that a defendant does not want counsel and then force a waiver of this precious right if the defendant is nothing more than bothersome, detestable, difficult, stubborn, annoying, or indecisive. The fundamental Constitutional right to counsel cannot hinge on a defendant's extraneous demeanor in the courtroom. If the original intent of *Faretta* is to be restored, this Court must require that a defendant make an explicit,

intentional choice to waive his right to counsel and not allow a trial judge to create one for him.

CONCLUSION

It is respectfully submitted that for overriding reasons of Constitutional law and public policy considerations, this Court should grant the Petitioner's request for a Writ of Certiorari.

The right to counsel is one of the most cherished and heretofore protected rights guaranteed by the Constitution to criminal defendants. Only with the effective assistance of counsel can a defendant be assured of receiving a fair trial.

When a defendant gives up his right to a lawyer, it is on the same plane as when a defendant elects to plead guilty and gives up his right to a trial. When a defendant waives his right to trial and pleads guilty, the courts go to great lengths to insure that the waiver is knowing, intelligent, and voluntary; and that it is also clear and unequivocal. The same should hold true for the waiver of counsel.

The erosion of the standards set by this Court in *Faretta* with respect to waiving the right to counsel by certain circuits will continue to spiral downward unless this Court reaffirms its holding in *Faretta* through the instant case. This deterioration of the right to counsel continues to adversely effect criminal defendants on both the state and federal levels. This Court should articulate a bright line rule that requires a defendant to expressly assert his waiver of his right to counsel before it can be accepted just as it has with respect to a defendant's waiver of his right to trial. By articulating such a rule it

will bring all the circuits in line with one another and restore the Petitioner's Constitutional rights as well.

Respectfully submitted,

LORENZO AVENDANO-RAMIREZ,
Petitioner

JAMES MARTIN DAVIS #10927
DAVIS & FINLEY
1623 Farnam St.
Suite 500
Omaha, Nebraska 68102
(402) 341-9900

Counsel of Record
for Petitioner

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-2932

United States of America, Appellee, v. Lorenzo Avendano-Ramirez, Appellant.	*	Appeal from the United States District Court for the District of Nebraska. [UNPUBLISHED]

Submitted: December 12, 2000
Filed: December 19, 2000

Before LOKEN, HEANEY, and FAGG, Circuit Judges.

PER CURIAM.

Lorenzo Avendano-Ramirez appeals his conviction for distribution of methamphetamine and the forfeiture of money as illegal drug proceeds. Avendano-Ramirez first contends the district court abused its discretion in denying his verbal motion for substitute counsel immediately before the trial started. The district court did not abuse its discretion in denying the motion, however, because Avendano-Ramirez failed to show any justifiable dissatisfaction with his retained attorney, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communications. *See United States v. Smith,*

62 F.3d 1073, 1077 (8th Cir. 1996); *United States v. Klein*, 13 F.3d 1182, 1185 (8th Cir. 1994). Contrary to Avendano-Ramirez's complaint that his attorney "had not done anything for him," the attorney informed the district court he had met with Avendano-Ramirez several times, he was prepared to go to trial, and Avendano-Ramirez was merely dissatisfied with the attorney's assessment of the strength of the prosecution's case. After the district court refused to appoint substitute counsel, Avendano-Ramirez requested to proceed alone, and after a lengthy discussion, the district court allowed Avendano-Ramirez to represent himself with the retained attorney acting as standby counsel. Avendano-Ramirez now contends his waiver of his right to counsel was not knowing, voluntary, and intelligent. Having reviewed the particular facts and circumstances surrounding the case, we conclude the district court made Avendano-Ramirez aware of his right to counsel or to represent himself, and of the possible consequences if he decided to proceed without counsel's help. *See United States v. Stewart*, 20 F.3d 911, 917 (8th Cir. 1994). Next, Avendano-Ramirez asserts the district court should have recused itself before considering his motion for a new trial. A reasonable person would not question the district court's impartiality, so the district court did not abuse its discretion in denying the motion for recusal. *See Bannister v. Delo*, 100 F.3d 610, 614 (8th Cir. 1996). Last, Avendano-Ramirez contends he is entitled to a new trial based on *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000). Because Avendano-Ramirez's sentence was within the statutory range authorized by 18 U.S.C. § 841(b)(1)(C), the *Apprendi* rule does not apply. *See United States v.*

Aguayo-Delgado, 220 F.3d 926, 934 (8th Cir. 2000), *petition for cert. filed*, No. 00-6746 (U.S. Oct. 16, 2000).

We thus affirm the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2932NEO

United States of America, Appellee, v. Lorenzo Avendano-Ramirez, Appellant.	*	Appeal from the United States District Court for the District of Nebraska

JUDGMENT

(Filed Mar. 21, 2001)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

(5172-010199)

December 19, 2000

A true copy.

ATTEST: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. LORENZO AVENDANO-RAMIREZ, Defendant.	)	8:00CR52 ORDER (Filed Jun. 23, 2000)

This matter is before the Court on defendant's Motion to Recuse (Filing No. ___).

IT IS ORDERED that said motion is denied.

Dated this 23rd day of June, 2000.

BY THE COURT:

/s/ William G. Cambridge
WILLIAM G. CAMBRIDGE
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, vs. LORENZO AVENDANO-RAMIREZ, Defendant.	)	8:00CR52 ORDER (Filed Jul. 07, 2000)

This matter came on for hearing on this 6th day of July, 2000, upon the defendant's motion for a new trial. Having taken evidence and being fully advised in the premises, said motion was denied, all for the reasons set forth by the Court from the bench following said hearing.

BY THE COURT:

/s/ William G. Cambridge
WILLIAM G. CAMBRIDGE
UNITED STATES DISTRICT
JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-2932

United States of America, Appellee, v. Lorenzo Avendano-Ramirez, Appellant.	*	Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

February 15, 2001

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

(2)

No. 01-106

OCT 18 2001

In the Supreme Court of the United States

CLERK

LORENZO AVENDANO-RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
MICHAEL CHERTOFF
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner was deprived of his Sixth Amendment right to counsel by the trial court's decision to proceed to trial with petitioner representing himself and with his attorney acting as standby counsel.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	13
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Adams v. *Carroll*, 875 F.2d 1441 (9th Cir. 1989)	17
Adams v. *United States ex rel. McCann*, 317 U.S. 269 (1942)	15
Apprendi v. *New Jersey*, 530 U.S. 466 (2000)	13
Berry v. *Lockhart*, 873 F.2d 1168 (8th Cir. 1989)	17
Burton v. *Collins*, 937 F.2d 131 (5th Cir.), cert. denied, 502 U.S. 1006 (1991)	17
Faretta v. *California*, 422 U.S. 806 (1975)	15
Fields v. *Murray*, 49 F.3d 1024 (4th Cir.), cert. denied, 516 U.S. 884 (1995)	17
Fitzpatrick v. *Wainwright*, 800 F.2d 1057 (11th Cir. 1986)	17
Gideon v. *Wainwright*, 372 U.S. 335 (1963)	14
Jackson v. *Ylst*, 921 F.2d 882 (9th Cir. 1990)	17
Johnson v. *Zerbst*, 304 U.S. 458 (1938)	15
Marshall v. *Dugger*, 925 F.2d 374 (11th Cir. 1991)	17, 18
McKee v. *Harris*, 649 F.2d 927 (2d Cir. 1981), cert. denied, 456 U.S. 917 (1982)	15
Moreno v. *Estelle*, 717 F.2d 171 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984)	17
Perry v. *United States*, 364 A.2d 617 (D.C. 1976)	17
State v. *Garcia*, 600 P.2d 1010 (Wash. 1979)	17
United States v. *Auen*, 864 F.2d 4 (2d Cir. 1988)	16

Cases—Continued: Page

United States v. *Goldberg*, 67 F.3d 1092 (3d Cir. 1995) 14
United States v. *Kneeland*, 148 F.3d 6 (1st Cir. 1998) 14
United States v. *Moore*, 706 F.2d 538 (5th Cir.), cert. denied, 464 U.S. 859 (1983) 16
United States v. *Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988), cert. denied, 492 U.S. 908 (1989) 15
United States v. *Oreye*, 263 F.3d 669 (7th Cir. 2001) 16
United States v. *Smith*, 62 F.3d 1073 (8th Cir. 1996) 14
United States v. *Weisz*, 718 F.2d 413 (D.C. Cir. 1983), cert. denied, 465 U.S. 1027 (1984) 17
United States v. *Welty*, 674 F.2d 185 (3d Cir. 1982) 15
United States v. *Willie*, 941 F.2d 1384 (10th Cir.), cert. denied, 502 U.S. 1106 (1992) 17
Wisniewski v. *United States*, 353 U.S. 901 (1957) 17

Constitition and statutes:

U.S. Const. Amend. VI 14, 15
21 U.S.C. 841(a)(1) 2
21 U.S.C. 853 (1994 & Supp. V 1999) 2

In the Supreme Court of the United States

No. 01-106

LORENZO AVENDANO-RAMIREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unpublished, but the judgment is noted at 242 F.3d 377 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. A4) was entered on December 19, 2000. A petition for rehearing was denied on February 15, 2001 (Pet. App. A7). On May 2, 2001, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including July 15, 2001. The petition was filed on July 16, 2001 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Nebraska, petitioner was convicted on four counts of distribution of methamphetamine in violation of 21 U.S.C. 841(a)(1). The jury found that $3210 was subject to forfeiture pursuant to 21 U.S.C. 853 (1994 & Supp. V 1999). The court sentenced petitioner to 121 months in prison, to be followed by five years of supervised release.

1. During January and February 2000, petitioner sold methamphetamine to cooperating witnesses four times. The transactions were tape-recorded and were also observed by law enforcement personnel. Trial Tr. 142-171, 216-245.

2. Petitioner's trial began on May 4, 2000. Because petitioner's native language is Spanish, two interpreters were present. Trial Tr. 2. As jury selection was about to begin, petitioner stood, pounded the table, and announced that he did not "want to hear anything." *Ibid.* The court ordered him to sit down, but petitioner continued that he "want[ed] a different lawyer" because "this lawyer hasn't done anything for me." *Ibid.*

After excusing the prospective jurors, the court sought to learn the reason for petitioner's disruption. The court began with defense counsel, Joseph Lopez-Wilson, who replied:

> As I told you over the phone, my client has a problem with me representing him. * * *. We've gone over all the evidence. I've told him the possibilities of how the case may turn out and apparently he doesn't like that.

Trial Tr. 3. The court also discussed the situation with petitioner:

> THE DEFENDANT: I want another attorney. I want to tell you that I want another attorney because this attorney has not represented me. He has not done anything for me.
>
> THE COURT: Well, what is it specifically that you think he hasn't represented you on?
>
> THE DEFENDANT: This attorney hasn't done anything for me yet.
>
> THE COURT: What do you mean? What do you want him to do for you, sir?
>
> THE DEFENDANT: Something. He can do something for me. This attorney hasn't done anything for me. I want another attorney.
>
> THE COURT: Well, you know, here we are, it's the day of trial. And, you know, when you simply say he's done nothing for you, I don't know what that means.

Id. at 4.

The court asked defense counsel whether he had conferred with his client. Counsel replied that he had conferred with petitioner and "presented all the evidence to him," but stated that petitioner "apparently * * * doesn't like the way I look at the evidence and feels that someone else could make the evidence go away." Trial Tr. 4. Counsel also told the court that he was prepared to go to trial. *Id.* at 5.[1]

---

[1] The Assistant United States Attorney later informed the court that he had talked with defense counsel 10-15 times "about

The court announced that it was denying petitioner's request for a new lawyer. Trial Tr. 5. Petitioner interrupted the court, repeating his demand for another attorney. *Ibid.* The court said that it "under[stood]" petitioner's position, but reaffirmed its ruling that it was not giving another attorney to petitioner and stated that "[w]e're going to trial now." *Ibid.*

Petitioner then interrupted the court again, exclaiming "[t]hen I do not want to listen to anything." Trial Tr. 5. The court warned petitioner that he would be removed if he disrupted the proceedings. *Id.* at 5-6. When petitioner replied that he wanted another attorney, the court responded:

> THE COURT: Well, I'm telling you you're not going to have another attorney. And if you don't want this one, why, you can try the case yourself. You can try the case pro se. But I advise against that because there's many * * * complicated things involved here and you need an attorney. And you best use the one you've got.
>
> THE DEFENDANT: But I do not want this attorney, I said.
>
> THE COURT: You're either having—
>
> THE DEFENDANT: I already told him that I did not want this attorney.

---

different aspects of the case" and about potential plea bargains. Trial Tr. 7. Defense counsel also told the court that he had met with petitioner "at least five times," and that he had spoken with petitioner's family "on at least three different occasions." *Id.* at 18-19.

> THE COURT: I'm telling you that you're going to proceed to trial with this attorney or you're going to proceed to trial with no attorney at all.

Id. at 6.

Defense counsel moved to withdraw from the case. Trial Tr. 8. Counsel explained that he had "asked my client on several occasions if that's his wish, and he says yes, and it doesn't matter if he goes alone." *Ibid.* Counsel stated that he "probably should ask the Court to allow me to withdraw and let him proceed pro se" and that he believed that his request was consistent with his client's wishes. *Ibid.*

The court asked petitioner numerous times whether he wanted to proceed pro se, but petitioner refused to answer and kept insisting that he wanted another attorney. Trial Tr. 8. The court reiterated that it understood "what you're saying to me. But you're apparently not understanding what I'm saying to you, and that is we're going to trial here today and you're either going to trial with this attorney or you're going to trial with no attorney." *Ibid.* The court told petitioner that it was going to allow defense counsel to withdraw and stated "that means you're going to trial here today without an attorney, Mr. Avendano. Do you want to do that?" *Id.* at 9. Instead of answering, petitioner said once more that he wanted a new lawyer. *Ibid.*

The court turned to advising petitioner about his constitutional right to proceed pro se and warning him of the perils of doing so. The court told petitioner that he could represent himself but that any waiver of his right to counsel had to be knowing and voluntary. Trial Tr. 9-10. Although the court made several attempts to find out whether petitioner understood these rights,

petitioner did not respond and repeated his demand for a different lawyer. *Ibid.* With some difficulty, the court was able to determine that petitioner had not studied law or previously represented himself in court and that he was unaware of the Federal Rules of Evidence and the Federal Rules of Criminal Procedure. *Id.* at 10-14. Petitioner did not respond to the court's efforts to learn whether he understood the charges against him, the potential sentences he faced, and that the court would be unable to advise him about how to try his case if he proceeded pro se. *Id.* at 11-13, 17. The court also told petitioner "that in my opinion you would be far better defended by Mr. Joseph Wilson Lopez who is your attorney now than you can by yourself" and "strongly urge[d]" petitioner "not to try to represent" himself. *Id.* at 14-15. The court continued:

> THE COURT: All right. You know what the penalties are that you're facing if you're found guilty. And in view of those and in light of all the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by Mr. Wilson?
>
> THE DEFENDANT: No, I just want a different lawyer. I just want you to get me a different lawyer.
>
> THE COURT: I've told you several times, Mr. Avendano, that I'm not going to appoint you a different attorney. No justification or good cause has been shown to me why that ought to be done, other than your desire, which isn't standing in and of itself.

THE DEFENDANT: He hasn't done anything for me. So far he hasn't done anything for me.

THE COURT: I take it from your response to the Court then that you wish to represent yourself instead of having Mr. Wilson represent you; is that correct?

THE DEFENDANT: No, I don't want to be my own lawyer. I just want to get a lawyer that's going to represent me correctly.

THE COURT: Well then, you wish Mr. Wilson to assist you and represent you, do you?

THE DEFENDANT: I want a different one, I don't want him.

THE COURT: All right. Well, I've told you you're not going to get a different one. You've shown me no good cause why you should get a different one.

Now, we're going to proceed to trial and we're going to proceed to trial either with you being represented by Mr. Wilson or you representing yourself. Which is it?

THE DEFENDANT: He hasn't represented me. He hadn't come to see me until just about a week ago. I was there several months in jail. He didn't come to see me until just about a week ago.

THE COURT: Mr. Wilson, is that true?

MR. LOPEZ-WILSON: No, your Honor, it's not. As you know, every time we go to jail we sign in. There's at least five times that I've gone to see him.

I've spoken with the family on at least three different occasions. They've come to—I brought a witness because I thought he might say that. She works at my office. She knows that we've accepted numerous phone calls from him as well as his family to discuss this aspect of the case. But as you can see, it's very difficult to represent him.

I would again ask you to allow me to withdraw from the case and let him go pro se or get a court-appointed attorney. I don't think I could defend him after the things he's said.

THE COURT: Now, do you want Mr. Wilson to represent you or are you going to represent yourself in this trial?

THE DEFENDANT: I just want a different lawyer.

THE COURT: I'm telling you you're not going to get a different lawyer, Mr. Avendano. And I'm going to ask you once more—

THE DEFENDANT: Well, let me have a trial with a different lawyer later.

THE COURT: No, we're not going to have a trial with a different lawyer later, we're going to have a trial now. Do you want to represent yourself in this trial or do you want Mr. Wilson to represent you?

THE DEFENDANT: I don't want him as a lawyer as I told you already.

> THE COURT: Then we'll allow you to represent yourself. And I'm appointing you, Mr. Wilson, as standby counsel.

Trial Tr. 17-20. Defense counsel expressed reservations about acting as standby counsel, but the court denied counsel's request to withdraw from the case. *Id.* at 20-21.

At the conclusion of this process, the court stated:

> THE COURT: * * * I find that due to the defendant's action, he has knowingly and voluntarily waived his right to the services of Mr. Joe Lopez-Wilson, his court-appointed attorney.
>
> And I'm going to allow the defendant, therefore, to represent himself with, as I've done here, the assistance of standby counsel with Mr. Wilson performing such.

Id. at 23-24.

When the jury panel returned for jury selection, petitioner asked to be removed from the courtroom:

> THE COURT: Please be seated. You please be seated too, Mr. Avendano. Please be seated.
>
> THE DEFENDANT: I don't want to hear anything.
>
> THE COURT: All right.
>
> THE DEFENDANT: I don't want to hear anything until I have a different lawyer.
>
> THE COURT: Mr. Avendano, I've given you fair warning. You either have to be seated now and remain silent, or else I'll have to remove you from the courtroom.

> THE DEFENDANT: Then take me out. Remove me.
>
> THE COURT: All right. Marshals, take him out to the entryway here. And I want—get a chair for him out there and one of you interpreters go out there, open the door slightly so you can hear what's going on in here and interpret to him.
>
> Mr. Avendano, if at any time you wish to come back into the courtroom, you may do so. Simply tell the marshals and you'll be allowed to return.

Trial Tr. 25. Just before it was to begin questioning the jury panel, the court specifically asked petitioner if he wished to return to the courtroom, but petitioner declined the offer. *Id.* at 29. Petitioner also declined an invitation to return before the government began its questioning of the panel. *Id.* at 47-48.

Before peremptory strikes were exercised, the court asked petitioner whether he wanted to ask any questions of the jury panel. Petitioner apologized to the court but reiterated that he wanted another attorney. Trial Tr. 58. Petitioner named the attorney he wanted, but defense counsel informed the court that the attorney in question had told the prosecutor that he would not take the case on such short notice. *Id.* at 58-59. Petitioner declined the court's offer to participate in exercising the peremptory strikes. *Id.* at 59-60.

After jury selection was completed, petitioner declined to be present in the courtroom. The court encouraged him to return for opening statements, but petitioner repeated his demand for a different attorney. Trial Tr. 72-73. At petitioner's request, he was taken back to his holding cell. *Id.* at 74-75. The court gave its preliminary instructions, and the prosecutor and

defense counsel made their opening statements. *Id.* at 78-96.[2]

On the second day of trial, the court asked petitioner to return to the courtroom for the presentation of evidence. When petitioner declined, he was taken back to the holding cell. Trial Tr. 102. Before the jury was brought in, the court and counsel discussed Lopez-Wilson's role. *Id.* at 103- 104. The court stated that it "expect[ed] Mr. Wilson to continue to act as he has already acted and that is representing the defendant in his absence." *Id.* at 104.

The government called nine witnesses. Petitioner was brought back to the courtroom so the first witness could identify him, Trial Tr. 125-126, and remained during Lopez-Wilson's cross-examination of the witness. *Id.* at 126-129. At the conclusion of the cross-examination, the court asked petitioner whether he had any questions to ask the witness. *Id.* at 130. Petitioner responded that he "[could not] say anything until I do not have my other attorney." *Ibid.*

During the direct examination of the second witness, petitioner announced that he "[did not] want to listen to anything until I have my other lawyer." Trial Tr. 149-

---

[2] Although the court appointed Lopez-Wilson as petitioner's "standby counsel," he performed a variety of functions throughout the trial. On petitioner's behalf, Lopez-Wilson participated in jury selection, Trial Tr. 36, 57-58, 59-60, delivered an opening statement, *id.* at 95-96, objected and conducted foundational examinations during the government's presentation of its evidence, *id.* at 109, 113-117, 119-120, 121, 123-124, 133, 156-157, 176, 178, 179-180, 184-185, 217, 218, 219, 224, 225-226, 232, 234, 236, 240, 242, 273, 278, 299-300, 302-303, 307, 317, 319, 338, cross-examined the government's witnesses, *id.* at 127-129, 188-209, 245-265, 268-269, 279-280, 283-285, 305-306, 311-313, and delivered a closing argument, *id.* at 345-354.

150. After the witness identified him, petitioner was returned to his holding cell. *Id.* at 150. Petitioner was brought back to the courtroom before cross-examination of the second witness so that Lopez-Wilson could speak to him. *Id.* at 185-187. Lopez-Wilson informed the court that petitioner did not want to be present for the rest of the proceedings, did not want any input into the cross-examination, and did not want Lopez-Wilson to do anything. *Id.* at 187. Petitioner was taken back to his holding cell, and the court told Lopez-Wilson to "give [petitioner] the best representation you can give." *Id.* at 188.

Petitioner was brought back to the courtroom at the conclusion of the direct examination of the third witness. After the witness identified him, petitioner again stated that he did not want to be in the courtroom until he had another attorney. He was then removed, Trial Tr. 220-224, and remained outside the courtroom during the testimony of the remaining six witnesses, who testified about the chain of custody of the methamphetamine. The government then rested. *Id.* at 320.

Defense counsel moved to have the case dismissed for lack of evidence and for a continuance so that he could confer with petitioner about putting on a defense. Trial Tr. 320. The court denied both motions, but ordered a brief recess to permit defense counsel to talk with petitioner. *Ibid.* After the recess, petitioner stated on the record that he did not want to testify, the defense rested, and court was adjourned for the day. *Id.* at 321.

On the third day of trial, the district court inquired whether petitioner wished to be in the courtroom for the closing arguments and the jury instructions. Petitioner responded that he wanted his new attorney to be

present. The court told petitioner that he was represented by Lopez-Wilson and that no other attorney had entered an appearance. Trial Tr. 332-334. Petitioner remained in the courtroom for the closing arguments and the jury instructions. *Id.* at 361. The jury found petitioner guilty on all four counts and found $3210 subject to forfeiture as illegal drug proceeds. *Id.* at 364-365, 369.

3. The court of appeals affirmed. Pet. App. A1-A3. The court held that the district court did not abuse its discretion in denying petitioner's motion for substitute counsel on the eve of trial because "[petitioner] failed to show any justifiable dissatisfaction with his retained attorney, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communications." *Id.* at A1. The court also held that the district court did not err in allowing petitioner to represent himself with his retained attorney as standby counsel. *Id.* at A2. "Having reviewed the particular facts * * * [of] the case," the court concluded that "the district court made [petitioner] aware of his right to counsel or to represent himself, and of the possible consequences if he decided to proceed without counsel's help." *Ibid.* The court accordingly rejected petitioner's claim that his waiver of the right to counsel was not knowing, voluntary, and intelligent. *Ibid.*[3]

ARGUMENT

Petitioner contends (Pet. 8-30) that he was improperly forced to represent himself at trial because he did

---

[3] The court of appeals also rejected petitioner's claim that the district judge should have recused himself from considering petitioner's motion for a new trial and petitioner's claim that his sentence violated *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). Pet. App. A2-A3. Petitioner does not renew those claims here.

not knowingly and intelligently waive his right to counsel and did not clearly and unequivocally assert his right to self-representation. The court of appeals correctly rejected that claim, and its unpublished, fact-bound decision presents no issue warranting further review.

1. The Sixth Amendment protects the right to the assistance of counsel at a felony trial. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). Nevertheless, the Constitution does not give a defendant the right to delay his trial unreasonably in order to change counsel. A district court is entitled to deny a defendant's last-minute request to change lawyers unless the defendant presents a sufficient reason for the proposed switch. See, *e.g.*, *United States* v. *Smith*, 62 F.3d 1073, 1077 (8th Cir. 1996); *United States* v. *Goldberg*, 67 F.3d 1092, 1098 (3d Cir. 1995).

The district court denied petitioner's request for a new attorney here because petitioner failed to offer a specific or sufficient justification in support of it. The court of appeals correctly affirmed that holding, Pet. App. A3, and petitioner does not challenge it here. Accordingly, although petitioner had the right to be represented by counsel, he did not have the right to refuse representation by Lopez-Wilson and then to delay the trial to procure new counsel. The question before this Court, therefore, is whether, when petitioner stated his desire not to have Lopez-Wilson as counsel, the district court permissibly held that petitioner had waived his right to counsel and elected to proceed pro se. Cf. *United States* v. *Kneeland*, 148 F.3d 6, 11-12 (1st Cir. 1998) (holding that the fact that a defendant would prefer to be represented by a different attorney does not mean that he may not be required to choose between being represented by his court-

appointed lawyer and proceeding pro se); *United States* v. *Moya-Gomez*, 860 F.2d 706, 739 (7th Cir. 1988) (same), cert. denied, 492 U.S. 908 (1989); *United States* v. *Welty*, 674 F.2d 185, 188 (3d Cir. 1982) (same); *McKee* v. *Harris*, 649 F.2d 927, 931 (2d Cir. 1981) (same), cert. denied, 456 U.S. 917 (1982).

In *Faretta* v. *California*, 422 U.S. 806, 832-834 (1975), this Court held that the Sixth Amendment guarantees a defendant the right to forgo counsel and conduct his own defense. Because a defendant who represents himself "relinquishes * * * many of the traditional benefits associated with the right to counsel," a defendant seeking to proceed pro se "must 'knowingly and intelligently'" waive that right. *Id.* at 835 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464-465 (1938)). Moreover, the Court has stated that a defendant seeking to proceed pro se "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Ibid.* (quoting *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).

Petitioner claims (Pet. 8-26) that he did not knowingly and intelligently waive his right to counsel because he never "clearly and unequivocally" expressed a desire to proceed pro se.[4] But the situation confronting the district court required it to determine, as best it could, petitioner's desires in the face of his refusal to respond directly to the court's questions. The court made it clear that petitioner could proceed to trial with Lopez-Wilson, or he could choose to represent himself,

---

[4] Petitioner does not contend that the district court failed to make him aware of the "dangers and disadvantages of self-representation." *Faretta*, 422 U.S. at 835; see Trial Tr. 10-17.

but he did not have the right to delay the trial by electing to proceed only with new counsel. The court attempted to have petitioner acknowledge expressly that he understood the consequences of forgoing representation by Lopez-Wilson, but petitioner would not do so. It was only after repeated explanation of petitioner's options that the district court found that petitioner had knowingly and voluntarily waived his right to counsel. Under these circumstances, the district court's interpretation of petitioner's decision was within the bound of its discretion. See, *e.g.*, *United States* v. *Oreye*, 263 F.3d 669, 670 (7th Cir. 2001) (Posner, J.) ("[A] defendant can waive his right to counsel through conduct as well as words. * * * Oreye was told that if he dismissed [his lawyer] and didn't find a substitute at his own expense, he would have to proceed pro se. If you're given several options, and turn down all but one, you've selected the one you didn't turn down."); *United States* v. *Auen*, 864 F.2d 4, 5 (2d Cir. 1988) (holding that defendant had validly waived his right to counsel when defendant failed to retain counsel despite the fact that the district court had "repeatedly offered [him] the opportunity to obtain legal representation"); *United States* v. *Moore*, 706 F.2d 538, 540 (5th Cir.) ("[A] persistent, unreasonable demand for dismissal of counsel and appointment of new counsel * * * is the functional equivalent of a knowing and voluntary waiver of counsel."), cert. denied, 464 U.S. 859 (1983).

2. Petitioner contends that the circuits are divided on whether a defendant may be deemed to have chosen to proceed pro se in circumstances comparable to those in this case, but there is no conflict warranting this

Court's review.[5] In *Marshall* v. *Dugger*, 925 F.2d 374 (11th Cir. 1991), the court of appeals did resolve a similar issue, but the facts of that case were different in

---

[5] In most of those cases, courts of appeals rejected defendants' claims that they had been denied their right of self-representation; those courts thus did not confront the question here of whether a defendant was required to proceed pro se without a valid waiver of counsel. See *Fields* v. *Murray*, 49 F.3d 1024, 1033-1034 (4th Cir.) (en banc), cert. denied, 516 U.S. 884 (1995); *Burton* v. *Collins*, 937 F.2d 131, 133-134 (5th Cir.), cert. denied, 502 U.S. 1006 (1991); *Jackson* v. *Ylst*, 921 F.2d 882, 888-889 (9th Cir. 1990); *United States* v. *Weisz*, 718 F.2d 413, 424-428 (D.C. Cir. 1983), cert. denied, 465 U.S. 1027, 1034 (1984); *Moreno* v. *Estelle*, 717 F.2d 171, 173-176 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984); see also *State* v. *Garcia*, 600 P.2d 1010, 1015 (Wash. 1979); *Perry* v. *United States*, 364 A.2d 617, 620 (D.C. 1976). In two other cases, courts rejected defendants' claims that they had been denied their right to counsel, finding that the defendants had clearly and unequivocally asserted their right to self-representation. *United States* v. *Willie*, 941 F.2d 1384, 1388-1391 (10th Cir.) (noting defendant's "repeated and unequivocal assertions of his right to self-representation"), cert. denied, 502 U.S. 1106 (1992); *Fitzpatrick* v. *Wainwright*, 800 F.2d 1057, 1064-1065 (11th Cir. 1986) (defendant "signed a written waiver expressly waiving his right to be represented by counsel"). In *Adams* v. *Carroll*, 875 F.2d 1441, 1444-1445 (9th Cir. 1989), the court concluded that the defendant had been denied his right of self-representation. None of these courts was required to address a situation in which a defendant, at that time of trial, forcefully and repeatedly waives the services of the only attorney to whom he is entitled but insists that he will only go to trial with new counsel.

Petitioner's claim (Pet. 16-20) that the court of appeals' decision conflicts with its earlier decision in *Berry* v. *Lockhart*, 873 F.2d 1168 (8th Cir. 1989), is incorrect. In *Berry*, the court held that the trial court had conducted an inadequate inquiry to determine whether the defendant's waiver of his right to counsel was voluntary, knowing, and intelligent. *Id.* at 1170-1171. Moreover, any inconsistency with *Berry* would be a matter for the Eighth Circuit to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

relevant respects. In *Marshall*, a district court rejected a defendant's request for new counsel and informed the defendant that his choices consisted of proceeding with his current lawyer, representing himself, or representing himself with his current lawyer functioning as standby counsel. See *id.* at 375-376. The defendant refused to select one of the three options and simply repeated his dissatisfaction with his current lawyer. See *id.* at 376. The court declined the prosecutor's request that it explain the dangers of proceeding pro se, stating that the defendant was "pretty much * * * aware of what it's going to be like to have to represent himself." *Ibid.* The court excused defense counsel, and the defendant was convicted after representing himself without the aid of standby counsel. *Ibid.*

The Eleventh Circuit held that the district court had improperly required the defendant to proceed pro se. The court explained that the defendant had not "knowingly and intelligently" waived his right to counsel because, absent "an oral or written *request*" to proceed pro se, he had not "affirmatively chose[n] self-representation." 925 F.2d at 377 (internal quotation marks and citation omitted). Although not "formally reach-[ing] the issue," the panel also indicated that it "would find the evidence insufficient to support the contention that [the defendant's] waiver was 'knowing and intelligent'" because the district court "made no inquiry into [the defendant's] understanding of the dangers and disadvantages of proceeding pro se" and "made no effort to inform him of these dangers." *Id.* at 377 n.1.

While there is some tension between the waiver analysis in *Marshall* and in this case, review by this Court is not warranted. The Eighth Circuit's unpublished disposition makes clear that its ruling was based

on "the particular facts and circumstances surrounding the case," Pet. App. A2, and the court did not purport to establish or alter any general rule. The Eighth Circuit did not address a situation (like the one presented in *Marshall*) where a district court had been less-than-clear in advising a defendant about his rights and the risks of self-representation, or where a defendant's refusal to respond directly to the court's efforts to elicit his desires was less extreme than it was here. Similarly, because the Eleventh Circuit in *Marshall* said that its decision could be justified on other grounds (*i.e.*, the district court's failure to ensure that the defendant understood the risks of proceeding pro se), it is uncertain how that court would rule in a case (like this one) where the district court did everything reasonably possible to advise the defendant of his rights and options.

Finally, here, unlike in *Marshall*, petitioner had active standby counsel, who presented a full defense. For that reason, the two cases are distinguishable and this case would not be a suitable vehicle for considering the standards governing a defendant's waiver of the right to counsel and invocation of the right of self-representation. Although the district court appointed Lopez-Wilson only as petitioner's "standby counsel," the court repeatedly emphasized that it expected Lopez-Wilson to act as petitioner's lawyer while petitioner chose to absent himself from the trial. Trial Tr. 104, 188. The record reflects that Lopez-Wilson did so, performing all of the functions of defense counsel. See note 2, *supra*. Although petitioner correctly notes that Lopez-Wilson "presented no evidence on the Petitioner's behalf," Pet. 7, the record shows that that was because *petitioner* waived his right to testify, Trial Tr. 321, and because the district court denied Lopez-

Wilson's motion for a continuance to permit him "to put on some evidence," *id.* at 320 (a ruling that petitioner did not challenge before the court of appeals and does not attack here). Because petitioner was functionally represented by counsel throughout his trial, this case presents an inapt vehicle for deciding whether the district court erred in holding that he voluntarily waived that right.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
MICHAEL CHERTOFF
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

OCTOBER 2001